

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION AT COLUMBUS**

ROBERT BETHEL,

Petitioner,

-vs-

DAVID BOBBY, Warden,

Respondent.

:

Case No. 2:10-cv-391

:

District Judge Michael R. Barrett
Magistrate Judge Michael R. Merz

:

ORDER GRANTING MOTION FOR STAY

This capital habeas corpus case is before the Court on Petitioner's Motion for Stay and Abeyance (Doc. No. 8). On the Court's Order to do so, Petitioner has supplemented the Motion with materials from the pending motion for new trial proceedings in the Ohio courts, including the August 17, 2010, decision of the Tenth District Court of Appeals affirming the denial of a new trial.

Petitioner asserts that the claim made in his Fifteenth Ground for Relief is also the constitutional claim made in the new trial proceedings. Plainly, Petitioner's potential Ohio remedy is not exhausted because time remains for Petitioner to appeal to the Ohio Supreme Court from the denial of new trial. Thus the Petition in this case is "mixed"; it contains both exhausted and unexhausted claims. When faced with a mixed petition, the district court has four options: (1) stay the entire petition; (2) dismiss the entire petition without prejudice; (3) deny the entire petition on the merits; or (4) dismiss the unexhausted claims and proceed with the exhausted ones. *Swanson v. DeSantis*, 606 F.3d 829 (6th Cir. 2010), citing *Harris v. Lafler*, 553 F.3d 1028, 1031-32 (6th Cir.

2009). In a case such as this where the statute of limitations is potentially implicated, dismissal of either the entire petition without prejudice or dismissal of the unexhausted claims without prejudice might result in there being barred from filing after exhaustion. The case is not ripe on the merits. The sole remaining option is a stay of the entire petition which is hereby GRANTED.

The order to the parties to prepare a Rule 26(f) report (Doc. No. 10) is vacated. The parties shall keep this Court currently advised of the status of the state court proceedings.

September 1, 2010.

s/ **Michael R. Merz**
United States Magistrate Judge